

(**FEDERAL MARITIME COMMISSION**)
(**SERVED SEPTEMBER 20, 1996**)
(**EXCEPTIONS DUE 10-15-96**)
(**REPLIES TO EXCEPTIONS DUE 11-6-96**)

FEDERAL MARITIME COMMISSION

DOCKET NO. 96-10

**SEAIR CARGO AGENCY INC.
d/b/a SEAIR INTERNATIONAL LINE
POSSIBLE VIOLATIONS OF SECTION 10(b)(1)
OF THE SHIPPING ACT OF 1984**

Respondent Seair Cargo Agency, Inc. found to have violated section 10(b)(1) of the 1984 Shipping Act by charging rates other than those specified in its tariff on 27 occasions between February 1994 and January 1996. Respondent's tariff and surety bond have been cancelled and it has ceased operations. Its only known assets are its \$50,000 bond. Accordingly, a penalty in that amount is assessed.

Vern W. Hill and Paul J. Kaller for the Bureau of Enforcement.
No appearance for respondent.

**INITIAL DECISION¹ OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE**

This is another of a series of Commission-instituted investigations into the activities of foreign-based non-vessel-operating common carriers (NVOCCs) who have failed to charge the rates specified in their tariffs or have failed to maintain surety bonds resulting

¹This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

in automatic cancellation of their tariffs. In two previous cases of this type, the Commission assessed civil penalties in the amount of \$50,000 to be collected under the bonds.² This proceeding is essentially the same type.

In this case the Commission began the proceeding by Order served May 10, 1996, naming as respondent an NVOCC known as Seair Cargo Agency, Inc., doing business as Seair International Line, located in Hong Kong. As stated in the Commission's Order of Investigation, a review of Seair's tariffs by the Commission's Bureau of Enforcement (BOE) showed that the tariff contained only Cargo, N.O.S. rates, and a further review of shipping documents showed that Seair was not charging these tariff rates on various shipments moving under Seair bills of lading from February 4, 1994 through January 28, 1995, and then again during the period from December 1995 through January 1996. The Commission therefore initiated the proceeding to determine if Seair had violated section 10(b)(1) of the Shipping Act of 1984 (46 U.S.C. app. sec. 1709(b)(1)) and, if so, what remedial orders, including cease and desist order, tariff-suspension order, or penalty assessment should be issued.³

²The two recent formal proceedings of this type were: *Trans Ocean-Pacific Forwarding, Inc. (TOP)*, 27 SRR 409 (I.D., F.M.C. notice of finality, February 9, 1996); and Docket No. 96-03, *F&D Loadline Corporation, Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, Initial Decision, served May 28, 1996, F.M.C. notice of finality, June 28, 1996, 27 SRR _____. In *TOP*, because of the particularly deceptive non-cooperative and willful behavior of respondent, a maximum penalty under law of over \$1 million was found warranted. However, because of respondent TOP's lack of assets in the United States, the amount over the \$50,000 which was available under TOP's bond was suspended.

³More specifically, the Commission's Order specified that the Commission wished to determine:

1. Whether Seair violated section 10(b)(1) of the 1984 Act by charging rates other than those filed in its tariff;
2. Whether, in the event Seair is found to have violated section 10(b)(1) of the 1984 Act, civil penalties should be assessed against Seair and, if so, the amount of such penalties;
3. Whether, in the event Seair is found to have violated section 10(b)(1) of the 1984 Act, a cease and desist order should be issued; and
4. Whether, in the event Seair is found to have violated section 10(b)(1) of the 1984 Act, its tariff should be suspended pursuant to section 13 of the 1984 Act.

By a series of orders which I served following the Commission's Order, a procedure was established to provide for BOE to file its evidentiary case and its legal brief. Provision was made for Seair to advise if it wished to participate in the litigation and, if so, to file evidence and arguments in its own defense. However, despite service of these orders on Seair in Hong Kong and on the resident agent named in its tariff, Seair declined to participate.⁴ Accordingly, this decision is issued based on the evidence and arguments tendered by BOE. BOE's evidentiary case consists of three affidavits submitted by Mr. Norman W. Littlejohn, BOE's Deputy Director; Mr. Alvin N. Kellogg, formerly a Commission District Investigator in the Commission's Los Angeles office, now Area Representative in New Orleans; and by Mr. Ernest L. Estes, an expert tariff specialist employed in the Commission's Office of Tariffs. Mr. Estes analyzed two packages of shipping documents (bills of lading, freight invoices, etc.) pertaining to 27 shipments handled by Seair, which documents had been obtained from Seair's California agents. Mr. Estes found that Seair had charged less than its filed tariff rates on the 27 shipments. In addition to the above, BOE has attached to its brief materials contained in the Commission's staff files pertaining to Seair's ATFI tariff and surety bond, which materials I officially notice under 46 CFR 501.161. All of these materials support the following findings of fact, which BOE proposes in its brief. I find that these findings are all properly supported by reliable

⁴Although it appears that the Commission's Order of Investigation and the Notice of Assignment of the case to the present judge were mailed and received by Seair's resident agent named in its tariff, a company located in Jamaica, N.Y., subsequent notices and rulings were returned by that named agent, and thereafter service was made on Seair in Hong Kong. Seair has thus been served with copies of BOE's evidence and brief in Hong Kong and with rulings advising Seair that it could, if it wished, submit evidence and a brief in its own defense. Seair has, however, ignored the rulings. The apparent failure of Seair to name and maintain a responsible resident agent for service of process in the United States may be a violation of section 23(c) and 46 CFR 583.5. However, this particular failure did not become known until the proceeding had been underway and therefore was not specified as an issue in the Commission's Order which began the proceeding.

and probative evidence under the Administrative Procedure Act, 5 U.S.C. sec. 556(d), and 46 CFR 501.154, or can be officially noticed. See also *Unapproved Sect. 15 Agreements--S. African Trade*, 7 F.M.C. 159, 169, 182 (1962).

FINDINGS OF FACT

1. Seair's Automated Tariff Filing and Information System ("ATFI") tariff became effective on September 4, 1993. Since that time, the only rate contained in Seair's tariff has been a Cargo, N.O.S. rate.

2. Seair had an NVOCC bond in effect and on file with the Commission from July 16, 1991 until August 7, 1996, when that bond was canceled by the issuing surety company.

3. On August 21, 1996, Seair's NVOCC tariff was canceled because of the previous cancellation of Seair's NVOCC bond.

4. During 1995 and 1996, investigations were conducted by the Commission's San Francisco and Los Angeles Districts, respectively, to determine whether Seair was charging rates other than the rates published in its ATFI tariff for ocean transportation between the Far East and the United States. As a result of those investigations, BOE obtained from Seair's West Coast receiving agents documents related to 27 Seair NVOCC shipments occurring during the periods February 4, 1994 - January 28, 1995 and December, 1995 - January, 1996. Those documents included Seair's NVOCC bills of lading showing commodity, weight and measure, and invoices of freight charges made to Seair's customers.

5. The aforementioned documents were reviewed and analyzed by Ernest L. Estes, an expert tariff analyst. Mr. Estes took the commodity, weight and measure from the applicable bill of lading and computed the proper ocean freight charges based on the Cargo, N.O.S. rate in Sear's ATFI tariff. Mr. Estes then compared those charges with the amounts actually charged by Sear to its customers. Mr. Estes concluded that with respect to each of subject 27 Sear NVOCC shipments, Sear charged rates less than the Cargo, N.O.S. rate published in its ATFI tariff. The aggregate amount of freight charged on the 27 shipments compared to the amount that should have been charged under Sear's tariff rates is shown in the following table compiled by Mr. Estes:

SEAIR CARGO AGENCY
d/b/a SEAIR INT'L LINE
(010638-002)

No.	B/L Number	Date	Freight Amount Charged	Applicable Freight Charge Per Tariff	Amount of Undercharge
1	HKGSF015710	02/04/94	\$5,100.00	\$85,700.00	\$80,600.00
2	HKGSF015841	03/14/94	\$95.40	\$1,555.00	\$1,459.60
3	HKGSF015919	03/29/94	\$1,270.00	\$12,500.00	\$11,230.00
4	HKGLGB10405	06/13/94	\$94.08	\$840.00	\$745.92
5	9407LAX10582	07/11/94	\$1,270.00	\$12,500.00	\$11,230.00
6	9407LGB10671	07/25/94	\$658.02	\$4,985.00	\$4,326.98
7	9408SF010809	08/08/94	\$1,475.00	\$8,450.00	\$6,975.00
8	9410SF011136	10/07/94	\$4,350.00	\$43,500.00	\$39,150.00
9	9410SF011345	10/08/94	\$3,900.00	\$37,500.00	\$33,600.00
10	9410SF011364	10/10/94	\$121.20	\$1,010.00	\$888.80
11	9410SF011556	11/05/94	\$3,900.00	\$37,500.00	\$33,600.00
12	9411LGB11635	11/14/94	\$220.48	\$1,790.00	\$1,569.52
13	9412SF011898	12/14/94	\$1,300.00	\$12,500.00	\$11,200.00
14	9501LGB12117	01/09/95	\$207.76	\$1,855.00	\$1,647.24
15	9501OAK12330	01/28/95	\$2,335.00	\$32,175.00	\$29,840.00
16	9512LAX15579	12/21/95	\$1,856.25	\$30,095.00	\$28,238.75
17	9512LAX15610	12/21/95	\$1,856.25	\$34,960.00	\$33,103.75
18	9512LAX15623	12/21/95	\$1,650.00	\$32,960.00	\$31,310.00
19	9512LAX15711	12/31/95	\$1,450.00	\$13,500.00	\$12,050.00
20	9601LAX15758	01/02/96	\$1,650.00	\$29,140.00	\$27,490.00
21	9601LAX15759	01/02/96	\$1,650.00	\$29,560.00	\$27,910.00
22	9601LAX15796	01/02/96	\$1,830.00	\$31,840.00	\$30,010.00
23	9601LAX15799	01/02/96	\$1,850.00	\$28,115.00	\$26,265.00
24	9601SF016019	01/21/96	\$1,450.00	\$14,500.00	\$13,050.00
25	9601LAX16024	01/21/96	\$1,181.25	\$14,675.00	\$13,493.75
26	9601LAX16025	01/21/96	\$1,575.00	\$27,975.00	\$26,400.00
27	9601LAX16037	01/21/96	\$1,575.00	\$24,000.00	\$22,425.00
27	Totals		\$45,870.69	\$605,680.00	\$559,809.31

DISCUSSION AND CONCLUSIONS

Section 10(b)(1) of the 1984 Act (46 U.S.C. app. sec. 1709(b)(1)) states that:

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may--

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts

It has been firmly established that an NVOCC is a carrier that is subject to section 10(b)(1) of the Act. See Docket No. 96-03, *F&D Loadline*, cited above, slip opinion at 9, and *TOP*, cited therein. As also discussed in *F&D Loadline*, the Commission has consistently enforced strict adherence to tariffs under the so-called "filed-rate" doctrine, which was enunciated by the Supreme Court as long ago as 1915. Under this doctrine even a carrier's good intentions do not excuse deviations from filed tariffs, although such intentions may mitigate penalties. *Id.* at 9-10. Moreover, the Commission has emphasized the importance of tariff enforcement in order to prevent discrimination. (*Id.* at 10.) Indeed, in this regard the Commission has stated (*Id.*):

The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminating rates.

As was the case in *F&D Loadline*, cited above, there is no question but that the record developed by BOE and the Commission's investigators shows that Seair deviated

from its tariff by charging lower, unfiled rates on 27 shipments it handled between February 1994 and January 1996. (See the table following para. 5 of the findings of fact above.) As shown by the table, the aggregate amount of the undercharges for these shipments was \$559,809.31. Whether Seair's shipping customers were pleased with these illegal discounts is not relevant to the question whether Seair violated law nor to the question of what penalties should be assessed. See *F&D Loadline*, cited above at 10. Therefore, the answer to the first question posed by the Commission, namely, did respondent Seair violate section 10(b)(1) of the 1984 Act by transporting shipments at rates other than those filed in its tariff is clearly affirmative.

The answers to issues Nos. 3 and 4 posed by the Commission are also rather clear. These issues concerned the question whether a cease and desist order should be issued against Seair and whether Seair's tariff should be suspended because of the violations. BOE does not recommend either action because Seair's tariff has been canceled following cancellation of its bond. There is also no evidence that Seair will continue operations in the United States. Under these circumstances neither order would be warranted. See *F&D Loadline*, cited above, at 11; *Marcella Shipping Co., Ltd.*, 23 SRR 857, 871-872 (I.D., F.M.C. notice of finality, March 26, 1986); *Interstate Commerce Commission v. B & T Transportation Co.*, 613 F.2d 1182, 1184 (1st Cir. 1980) (court properly denied injunctive relief when no reasonable expectation the violations would recur; orders should be molded to the necessities of the particular case).

The remaining issue is No. 2, the question whether penalties should be assessed against Seair, and if so, in what amount. As BOE points out, the governing law concerning

assessment of penalties, section 13(c) of the 1984 Act, requires the Commission to take into account various factors when fixing the amount of penalties, including "such other matters as justice may require." Specifically, section 13(c) (46 U.S.C. app. sec. 1712(c)) provides as follows:

ASSESSMENT PROCEDURE.--[T]he Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require.

BOE argues that considering the nature of Seair's unlawful activities, the surrounding circumstances, the extent and gravity of the violations, etc., as the law requires, a penalty should be assessed against Seair. I agree. Ordinarily the most difficult problem is not whether to assess a penalty but what amount of penalty to assess since so many factors are supposed to be weighed, including the violator's ability to pay. See *Merritt v. U.S.*, 960 F.2d 15, 17 (2d Cir. 1992); see also discussion of this weighing process in *F&D Loadline*, cited above, at 11-15.

In the instant case, as BOE points out, Seair filed a tariff for a three-year period but filed only one rate in the tariff, a Cargo N.O.S. rate. During that period, furthermore, Seair handled the subject 27 shipments without apparently making any effort to file the rates it actually charged, which rates were lower than the filed N.O.S. rate. Thus, as BOE notes, Seair routinely ignored the N.O.S. rate published in its tariff. Furthermore, despite being put on notice of its past unlawful activities and given the opportunity to defend itself, Seair has ignored this proceeding. It is not necessary to linger over the question whether the

penalty should be fixed at the maximum permitted by law (either \$135,000 or \$675,000, depending on whether the violations were committed "knowingly and wilfully"), however.⁵ That is because, as BOE notes, Seair's only known assets that could be reached to pay any penalty are found in its bond, which is limited to \$50,000, and, as required by section 23 of the 1984 Act, remains available for payment of Commission-assessed penalties. As in previous cases of this type, therefore, such as *F&D Loadline*, cited above, the only basis for fixing the amount of penalty is the \$50,000 available under Seair's surety bond. It is therefore ordered that Seair pay a penalty in that amount.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

Washington, D.C.
September 20, 1996

⁵As provided by section 13(a) of the Act, the maximum penalty that could normally be assessed against Seair on account of its 27 separate violations would be \$135,000 (27 times \$5,000 per each violation). If the violations were found to have been committed "knowingly and wilfully," the maximum penalty could be \$675,000 (27 times \$25,000). See section 13(a), 46 U.S.C. app. sec. 1712(a).